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इस भाग में भिन्न पृष्ठ संख्या दी जाती है जिससे कि यह अलग संकलन के रूप में
रखा जा सके

Separate Paging is given to this Part in order that it may be filed as a
separate compilation

भाग II—खण्ड 3—उप-खण्ड (iii) PART II—Section 3—Sub-section (iii)

(संघ राज्य क्षेत्र प्रशासनों के छोड़कर) केन्द्रीय अधिकारियों द्वारा जारी किए गए आदेश और अधिसूचनाएं
Orders and Notifications issued by Central Authorities (other than Administrations of Union
Territories)

भारत निर्वाचन आयोग

आदेश

नई दिल्ली, 7 नवम्बर, 1990

आ. प्र. 86:— निर्वाचन आयोग का समाधान हो गया है कि नीचे की सारणी के स्तम्भ (2) में यथा विनिर्दिष्ट पंजाब राज्य से लोक सभा के निर्वाचन के लिए जो स्तम्भ (3) में विनिर्दिष्ट निर्वाचन क्षेत्रों का हूआ है, स्तम्भ (4) में उसके सामने विनिर्दिष्ट निर्वाचन लड़ने वाला प्रत्येक अभ्यर्थी, लोक प्रतिनिधित्व अधिनियम, 1951 तथा तत्सम बनाए गए नियमों द्वारा अश्लेषित उक्त सारणी के स्तम्भ (5) में यथा वर्णित अपने निर्वाचन व्ययों का कोई भी लेखा विधि द्वारा अश्लेषित समय के अन्तर्गत और रीति से दाखिल करने में असफल रहा है।

और उक्त अभ्यर्थियों ने सम्यक सूचना दिए जाने पर भी उक्त असफलता के लिए या तो कोई कारण अथवा स्पष्टीकरण नहीं दिया है या उनके द्वारा दिए गए अभ्यावेदनों पर, यदि कोई हो, विचार करने के पश्चात् निर्वाचन आयोग का यह समाधान हो गया है कि उनके पास उक्त असफलता के लिए कोई पर्याप्त कारण या न्यायोचित्य नहीं है।

अतः अब निर्वाचन आयोग उक्त अधिनियम की धारा 10-क के अनुसरण में नीचे की सारणी के स्तम्भ (4) में विनिर्दिष्ट व्यक्तियों को संसद के किसी भी सदन के या किसी राज्य/संघ राज्य क्षेत्र की विधान सभा अथवा विधान परिषद के सदस्य चुने जाने और होने के लिए आदेश की तारीख से तीन वर्ष की कालावधि के लिए निरहित घोषित करता है।

सारणी

क्र. सं.	निर्वाचन का विवरण	निर्वाचन क्षेत्र की क्र. सं.	निर्वाचन लड़ने वाले अभ्यर्थियों के नाम और पते	निरहता का कारण
1	2	3	4	5
1.	लोक सभा के लिए साधारण निर्वाचन, 1989	1. गुरदासपुर संसदीय निर्वाचन क्षेत्र	कै. चानन सिंह सिद्ध, ग्रा. —कटिहार, पो. आ. — चापेर जिला— पटियाला, पंजाब	समय के अन्दर और रीति में लेखा जमा करने में असफल रहे।
2.	—वही—	13. फिरोजपुर संसदीय निर्वाचन क्षेत्र	श्री आसाराम, ग्राम और पो. — बाहवल बस्ती, तह. — अबोहर, जिला— फिरोजपुर पंजाब,	निर्वाचन व्यर्थों का कोई भी लेखा दाखिल करने में असफल रहे।
3.	—वही—	—वही—	श्री सुखदेव सिंह, ग्रा. व पो. —बुजैमुहर तह. — अबोहर, जिला— फिरोजपुर, पंजाब	—वही—
4.	—वही—	—वही—	श्री हरबंस सिंह, ग्राम —चाक अर्नी वाला, पोस्ट— जलालाबाद (पश्चिम), तहसील— फाजिलका, पंजाब	—वही—
5.	—वही—	—वही—	श्री बलजीध सिंह, मकान नं. 22, बस्ती गोबिन्द नगरी, फिरोजपुर शहर, पंजाब	—वही—
6.	—वही—	—वही—	श्री माखन सिंह, ग्राम— चाक अर्नी वाला, पोस्ट— जलालाबाद (पश्चिम) तहसील— फाजिलका, (पंजाब)	—वही—
7.	—वही—	—वही—	श्री मनोज धीमन मकान नं. 1, स्ट्रीट नं. 10, फिरोजपुर छावनी, (पंजाब)	—वही—
8.	—वही—	—वही—	श्री गुरुचरण सिंह, (प्रमुख मिल्कफेड) जिला— फिरोजपुर, ग्राम व पोस्ट— इस्लाम वाला, तहसील— फाजिलका, जिला— फिरोजपुर, (पंजाब)	—वही—

1	2	3	4	5
9. लोक सभा के लिए साधारण निर्वाचन, 1989	6. होशियारपुर संसदीय निर्वाचन क्षेत्र	श्री निर्मल सिंह, ग्राम ब पोस्ट- मियांनी, तहसील- दासुया, जिला- होशियारपुर, (पंजाब)	निर्वाचन व्ययों का कोई भी लेखा दाखिल करने में असफल रहे।	
10. —वही—	—वही—	श्री मोहन सिंह, ग्राम- बालाचूर तहसील- बालाचूर, जिला- होशियारपुर, (पंजाब)	—वही—	
11. —वही—	4. जालन्धर संसदीय निर्वाचन क्षेत्र	श्री मोहिन्द्र कुमार जैन, कोठी नं. 29, हकीकत रोड, जालन्धर छावनी, पंजाब	विधि द्वारा अपेक्षित रीति और समय के भीतर लेखा दाखिल करने में असफल रहे।	
12. —वही—	8- पटियाला संसदीय निर्वाचन क्षेत्र	श्री अजमेर सिंह सैनी, खरक मंगोली, जेन्द्र गुरुकुल उच्च विद्यालय, तह. कालका, जिला अम्बाला, पंजाब	निर्वाचन व्ययों का कोई लेखा दाखिल नहीं किया।	
13. —वही—	—वही—	श्री पवन कुमार, मौहल्ला मच्छी हाठ, सामना जिला पटियाला, (पंजाब)	—वही—	
14. —वही—	—वही—	श्री विनोद कुमार गुप्ता, सुपुत्र श्री हंस राज गुप्ता, 96. मानसहा कालोनी, पटियाला, पंजाब	—वही—	
15. —वही—	—वही—	श्री मदन लाल, 161- मौहल्ला खटरियान सानौर, जिला-पटियाला, (पंजाब)	अपना निर्वाचन व्ययों का लेखा विधि द्वारा अपेक्षित रीति से दाखिल करने में असफल रहे।	
16. —वही—	1-गुरदासपुर संसदीय निर्वाचन क्षेत्र	श्री मेला राम, मकान नं.- 334, धक्की- पठानकोट, पंजाब	निर्वाचन व्ययों का कोई भी लेखा दाखिल करने में असफल।	
17. —वही—	9-लुधियाना संसदीय निर्वाचन क्षेत्र	श्री जगदीश लाल, 4450, शिवाजी नगर, गली नं.- 109, लुधियाना, पंजाब	—वही—	

ELECTION COMMISSION OF INDIA

ORDER

New Delhi, the 7th November, 1990

O.N. 86.—Whereas the Election Commission is satisfied that each of the contesting candidates specified in column (4) of the Table below at the election to the House of the People from the State of Punjab as specified in column (2) and held from the constituency specified in column (3) against his name has failed to lodge any account of election expenses within the time and in the manner required by law as shown in column (5) of the said Table as required by the Representation of the People Act, 1951 and the Rules made thereunder;

And whereas the said candidates have either not furnished any reason or explanation for the said failure even after due notice or the Election Commission after considering the representations made by them, if any, is satisfied that they have no good reason or justification for the said failure;

Now, therefore, in pursuance of Section 10A of the said Act, the Election Commission hereby declares the persons specified in column (4) of the Table below to be disqualified for being chosen as and for being a member of either House of Parliament or of Legislative Assembly or Legislative Council of State/Union Territory for a period of 3 years from the date of this Order.

TABLE

S. No.	Particulars of Election	S.No. & Name of Constituency	Name & Address of the Candidates	Reason for disqualification
1	2	3	4	5
1.	General Election to the House of the People, 1989	1—Gurdaspur Parliamentary Constituency	Capt. Chanan Singh Sidhu, Village Katlaher, P.O. Chaper, District Patiala, Punjab.	Failed to lodge the Account within time and in the manner.
2.	-do-	13—Ferozepur Parliamentary Constituency	Shri Assa Ram, Vill. & P.O. Bahawal Bassi, Teh. Abohar, District Ferozepur, Punjab.	Failed to lodge any account of election expenses.
3.	-do-	-do-	Shri Sukhdev Singh, Vill. & P.O. Burj Muhar, Teh. Abohar, District Ferozepur, Punjab.	-do-
4.	-do-	-do-	Shri Harbans Singh, Vill. Chak Arainan Wala, P.O. Jalalabad (W), Teh. Fazilka, Punjab.	-do-
5.	-do-	-do-	Shri Baljit Singh, House No. 22, Basti Gobind Nagri, Ferozepur City, Punjab.	-do-
6.	-do-	-do-	Shri Makhan Singh, Vill. Chak Arainan Wala, P.O. Jalalabad (W), Teh. Fazilka (Punjab).	-do-
7.	-do-	-do-	Sh. Manoj Dhiman, H. No. 1, St. No. 10, Ferozepur Cantt., Punjab.	-do-
8.	-do-	-do-	Sh. Gurucharan Singh, (Chairman Milkfed, Distt. Ferozepur, Vill. & P.O. Islam Wala, Teh. Fazilka, District Ferozepur, Punjab.	-do-

1	2	3	4	5
9.	General Election to the House of the People, 1989	6—Hoshiarpur Parliamentary Constituency	Sh. Nirmal Singh, Vill. & P.O. Miani, Teh. Dasuya, District, Hoshiarpur, Punjab.	Failed to lodge any account of election expenses.
10.	-do-	-do-	Sh. Mohan Singh, Vill. Balachaur, Teh. Balachaur, District Hoshiarpur, Punjab.	-do-
11.	-do-	4—Jalandhar Parliamentary Constituency	Sh. Mohinder Kumar Jain, Kothi No. 29, Hakikat Road, Jalandhar Cantt., Punjab.	Failed to lodge the account within the time and in the manner required by law.
12.	-do-	8—Patiala Parliamentary Constituency	Sh. Ajmer Singh Saini, Kharak Mangoli, Janinder Guru Kul Uch Vidyalaya, Teh. Kalka, District Ambala, Punjab.	Failed to lodge any account of election expenses.
13.	-do-	-do-	Sh. Pawan Kumar, Mohalla Machhi Hatta, Samana, District Patiala, (Punjab).	-do-
14.	-do-	-do-	Sh. Vinod Kumar Gupta, S/o Sh. Hans Raj Gupta, 96—Mansahia Colony, Patiala, Punjab.	-do-
15.	-do-	-do-	Sh. Madan Lal, 161—Mohalla Khatrian, Sanaur, District Patiala, Punjab.	Failed to lodge his account of election expenses in the manner required by law.
16.	-do-	1—Gurdaspur Parliamentary Constituency	Sh. Mela Ram, House No. 334, Dhakki, Pathankot, Punjab.	Failed to lodge any account of election expenses.
17.	-do-	9—Ludhiana Parliamentary Constituency	Sh. Jagdish Lal, 4450, Shivaji Nagar, Gali No. 1.9, Ludhiana, Punjab.	-do-

[No. 76/PB-HP/90(5)/6104]

नई दिल्ली, 23 नवम्बर, 1990

प्रा. प्र. 87.—निर्वाचन आयोग 1989 को निर्वाचन अर्जी सं. 23 और 1989 को प्रत्यारोप अर्जी में तारीख 7-11-90 के दोनों निर्णयों को लोक प्रतिनिधित्व अधिनियम, 1951 (1951 का 43) की धारा 106 के अनुसरण में प्रकाशित करता है।

[सं. 82 अतम-रा. स./23/89-90]

आदेश से

सी. आर. बहमन, अवर सचिव

New Delhi, the 23rd November, 1990

O.N. 87.—In pursuance of section 106 of the representation of the People Act, 1951 (43 of 1951), the Election Commission hereby publishes the two judgements of the High Court of Guwahati, both dated 7-11-1990 in Election Petition No. 23 of 1989 and Recrimination Petition No. 18 of 1989.

IN THE GAUHATI HIGH COURT

(THE HIGH COURT OF ASSAM, NAGALAND, MEGHALAYA, MANIPUR, TRIPURA, MIZORAM AND ARUNACHAL PRADESH)

Election Petition No. 23 of 1989

Shri Abdul Muhib Mazumdar ...Petitioner

Versus

Sri Hiteswar Saikia and two others ...Respondents

PRESENT:

HON'BLE MR. JUSTICE MANISANA

For the Petitioner:

For the petitioner:

Mr. B. N. Sen.
Dr. M. K. Sharma.
Mr. S. S. Dey.
Mr. K. P. Pathak.
Mr. M. Nath.
Mr. N. Saika, Advocates.

For the respondents:

Mr. P. C. Kataki.
Mr. D. N. Choudhury.
Mr. S. A. Laskar.
Mr. A. K. Phukan.
Mr. G. K. Bhattacharyya.
Mr. A. K. Choudhury.
Mr. H. Munir.
Mr. N. Dutta.
Mr. M. Bhuyan.
Mr. B. P. Kataki, Advocates.

Date of hearing: 20 June, 1990.

Date of judgment: 7 November, 1990.

JUDGMENT

In this petition the petitioner Abdul Mahib Mazumdar has challenged the election of the respondent-2 Sri Amrit Lal Basumatari to the Council of States (Rajya Sabha). The election was held on 13-6-1989 in pursuance of the notice issued by the President of India calling upon the elected members of the Legislative Assembly of the State of Assam to elect two members to the Council of States from Assam to fill the seats of the members of the Council of States. Three candidates, namely the respondent-1 Shri Hiteswar Saikia, the respondent-2 Shri Amrit Lal Basumatari and the respondent-3 Shri David Ledger contested the election. The counting of votes took place on the same day, viz., on 13-6-1989. Out of 126 electors 124 cast their votes. The votes secured by the three candidates according to first preference were as follows: the respondent-1 Shri Hiteswar Saikia-42; the respondent-2 Shri Amrit Lal Basumatari-37; and respondent-3 Shri David Ledger-45. It is alleged that on recountings two first preference ballot papers recorded in favour of the respondent-1 Shri Hiteswar Saikia were rejected by the returning officer and, therefore, he secured 40 votes according to

first preference. After calculating the quota and transfer of value of votes, the respondent-3 David Ledger and the respondent-2 Shri Amrit Lal Basumatari were declared to have been elected.

2. The petitioner Shri Abdul Muhib Mazumdar, who is an elector, presented this election petition calling in question the election of the respondent-2 Shri Amrit Lal Basumatari on the ground that two first preference valid votes cast in favour of the respondent-1 Shri Hiteswar Saikia have been improperly rejected, and that there has been improper reception of one first preference vote which is void in favour of the respondent-2 Shri Amrit Lal Basumatari. The respondent-2 Shri Amrit Lal Basumatari resisted the petition. He also filed counter-claim under section 97 of the Representation of People Act, 1951, for short 'the Act'.

3. My predecessor framed the following issues.—

- (i) Whether the Election petition has been presented as prescribed under the Representation of People Act, 1951? If not whether the petition is liable to be dismissed?
- (ii) Whether the election petition is maintainable in its present form for not verifying the same in the manner required under the law?
- (iii) Whether the petitioner has locus standi to file the election petition, praying for relief under Section 84 of the Representation of People Act, 1951 not being a candidate in the biennial election to the Council of States held on 13-6-1989? If not, whether the election petition is liable to be dismissed as not maintainable?
- (iv) Whether the petitioner has been able to make out a case for scrutiny and/or re-scrutiny of three ballot papers specified in the election petition?
- (v) Whether the Returning Officer was justified in rejecting two ballot papers cast in favour of respondent No. 1 on the grounds of alleged double marking and use of different ink and, if not, whether such improper rejection of two ballot papers has materially affected the election of respondent No. 1 and also the result of the election?
- (vi) Whether the Returning Officer was justified in accepting one ballot paper in favour of respondent No. 2 rejecting the objections raised on behalf of the respondent No. 1 on the ground that marks 1 and 2 were given in the place not meant for such mark and, if not, whether such improper acceptance of the said ballot paper has materially affected the election of respondent No. 1 and the result of the election.
- (vii) Whether or not the petitioner is entitled to declaration that the election of the respondent No. 2 in the biennial election to the Council of States from Assam held on 13-6-1989 is void?
- (viii) Whether or not the petitioner is entitled to a declaration that the respondent No. 1 has been duly elected in the biennial election to the Council of States from Assam held on 13-6-1989?
- (ix) To what relief the petitioner is entitled to?"

and, thereafter, examined the witnesses of the parties and decided the issue nos. (i), (ii), (iii) and (iv). Issues nos. (i) and (ii) have been decided in favour of the election petitioner,

As regards the issue no. (iii) it has been decided that in an election petition filed by, an elector, he cannot claim declaration that any of the candidates has been duly elected. The issue no. (iv) which relates to scrutiny and/or inspection of these ballot papers, the inspection and/or scrutiny of one of the ballot papers has been allowed. While deciding issue no. (iv), it has been observed that the question whether another ballot paper, which has not been allowed for inspection, could be rejected on the second re-count and that too because it was different ink shall be gone into if required while discussing issue no. (v). It has been further observed that the other issues would be decided after the inspection of the ballot paper.

4. After I was assigned the duties to try the petition, a packet containing two rejected ballot papers was opened and the ballot paper in question was taken out and a xerox copy of it, marked 'X', has been placed on records.

5. Re issue no (vi). — On reading of the judgement of my predecessor, it appears that the inspection of the ballot paper, which has been alleged to have been accepted improperly in favour of Shri Amrit Lal Basumatari was not pressed. In that view of the matter, there is no material to decide the issue. Accordingly, issue no (vi) is decided against the election petition.

6. Re issue no (v). — Under rule 73(2)(a), a ballot paper is invalid and can be rejected if the figure 1 is not marked on it. Under the explanation appended to sub-rule (2) of rule 73, the figure 1 may be marked in the international form of Indian numerals or any Roman form or in the form used in any Indian language, but shall not be indicated in words. Under clause (d) of sub-rule (1) of rule 73, if the returning officer rejects any ballot paper he has to endorse on it the word "Rejected" and the ground of rejection

The question which arises for consideration is whether there was improper rejection of ballot paper, the xerox copy of which is marked 'X'. The endorsement of the returning officer on the back of the ballot paper reads: "Rejected as there is no first preference". The question then is, — Whether the figure marked on the ballot paper in the space opposite the name of the respondent-1 is figure 1 no. The figure marked on the original of the ballot paper, the copy of which is marked 'X', clearly indicates that it is figure 1. The evidence of the returned candidate (RW 1) is that the figure contains two lines instead one of provided under the law, and he himself had to rub the ball pen twice or thrice before he made the marking on the ballot paper. Therefore, the alleged ball pen may be defective. Be that as it may, the figure marked on the ballot paper in question clearly shows that it is figure 1 (not other figure) and, therefore, it is a valid one. For these reasons, the ballot paper was wrongly rejected by the returning officer.

7. As regards the rejection of the other ballot paper on the ground that it was marked with ink different from the ink supplied for that purpose, it is not disputed that the first preference was recorded in favour of the respondent-1 Shri Hiteswar Salkia. The contention of the election petitioner is that the same could not be rejected in a second re-count after the close of the counting as there is no provision for such a recount. Rule 82 of the Rules provides :

"(1) Any candidate or, in his absence, his election agent or counting agent may, at any time during the counting of the votes, either before the commencement or after the completion of any transfer of votes (whether surplus or otherwise), request

the returning officer to re-examine and re-count the papers of all or any candidates (not being papers set aside at any previous transfer as finally dealt with), and the returning officer shall forthwith re-examine and re-count the same accordingly.

(2) The returning officer may in his discretion re-count the votes either once or more than once in any case in which he is not satisfied as to the accuracy of any previous count:

Provided that nothing in this sub-rule make it obligatory on the returning officer to re-count the same vote more than once.

Under sub-rule (1) of rule 82, any candidate, or, in his absence, his election agent, or counting agent, may request the returning officer to re-examine and re-count the ballot papers of all or any of the candidates (not being papers set aside at any previous transfer as finally dealt with). But the request to re-examine or re-count of the ballot papers must be made during the counting of the votes, either before the commencement or after completion of any transfer of votes—surplus or otherwise. Under sub-rule (2), it is discretionary power of the returning officer to re-count votes either once or more than once when he is not satisfied as to the accuracy of any previous count, although under the proviso to sub-rule (2), it is not obligatory on the part of the returning officer to re-count same votes more than once. On a bare reading of the sub-rule (2), it reveals that it does not provide re-examination of any ballot paper. Therefore, the request for re-examination and re-counting of votes has to be made during the counting of votes and not when the counting has come to a close.

8. The evidence of the election petitioner Shri Abdul Muhib Mazumdar (PW 1) is that the first request for rejecting the same ballot paper was rejected by the returning officer and the second request was made by the respondent-2 for rejecting the same ballot paper after the close of the counting, and while waiting for declaration of the result. The evidence of Shri Amrit Lal Basumatari (RW 1), the returned candidate, is that his first request for re-examining and re-counting the ballot paper in question was rejected by the returning officer. In that application no reason was given. After the close of the counting, but before the declaration of the result, he filed another application by requesting the returning officer to re-examine the ballot paper is question by stating grounds, after his first application was rejected by the returning officer during the counting. The "Result Sheet—Original Counting", Ext.-4, indicates that the second ballot paper was rejected after close of the original counting and recording in the result sheet the number of votes polled by each candidate. In that view of the matter, the second request was made after the close of the counting, but before the declaration of the result. The returning officer allowed the prayer and re-examined the ballot paper and rejected the same and thereafter the returning officer re-counted the votes reducing the number of votes secured by Shri Hiteswar Salkia by one.

9. The ground of rejection of the ballot paper was that the figures thereon were marked by different ink otherwise than the ink supplied for that purpose. Under the rule 73(2)(c), if any figure is marked on it otherwise than with the article supplied for the purpose, the ballot paper is invalid, but the second proviso to clause (c) provides that where the returning officer is satisfied that any such defect as is mentioned in this clause has been caused by any mistake or failure on the part of a presiding officer or polling officer, the ballot paper shall not be rejected, merely on the ground of such defect. In view of the second proviso, merely because it was marked by different ink, it cannot be a ground for rejection, if the returning officer is satisfied that the defect has been caused by any mistake or failure on the part of a presiding officer or polling officer.

10. The evidence of returned candidate (RW 1), is that before the votes were cast the returning officer clearly instructed each of the voters that a pen has been kept on the

table and vote should be recorded with the aid of that pen only. In the evidence of RW 2, the counting agent of the returned candidate, he stated in the cross-examination that the returning officer instructed to use the pen, pencil or whatever was there in the polling both for marking the ballot papers. In the same breadth, he stated that the returning officer did not use the words pen, pencil or whatever material, he had only said about the material provided. But the evidence of RW 1 and RW 2 shows that the returning officer gave instructions. Normally, when the poll is taken it is the duty of the presiding officer or polling officer to give instructions as is indicated in the second proviso to rule 73(2)(e). Apart from that, the evidence of RW 1 conflicts with the evidence of RW 2 in this regard. The returning officer, the presiding officer or any of the polling officers has not been examined to clarify the conflicts of evidence between RW 1 and RW 2. If the statement of evidence of RW 2 is accepted, it would be difficult to say how the figures were marked with ink different from the ink supplied for that purpose.

11. As already stated, the returning officer did not reject the ballot paper at the first request. It has already been concluded that the second request and the second re-count was made after the close of the counting and recording of the votes polled by each candidate in the result sheet and that the request for re-examination and re-counting of votes has to be made during the counting of votes and not when the counting has come to a close. The respondent-2 Sri Basumatari could not make the second request and as such the re-count was not permissible under rule 83 of the Rules. Therefore, the rejection of that ballot paper was illegal. Admittedly, the first preference was recorded in favour of the respondent-1 Sri Hiteswar Saikia.

12. It has already been concluded that two first preference valid votes, which were cast in favour of Sri Hiteswar Saikia have been rejected improperly. Therefore, the respondent-1 Sri Hiteswar Saikia would have received 42 valid votes. It is not disputed that the respondent-3 received 45 votes and respondent-2 received 37 votes. The vote here means first preference vote. The question which, therefore, arises is whether the result of the election, in so far as it concerns the respondent-2 Sri Amrit Lal Basumatari has been materially affected. As stated earlier, the total number of valid votes recorded were 124. In this situation, the quota was $(124,000 \div 3) + 1 = 4,134$. The value of the votes received by Sri Hiteswar Saikia would be 4,200 (42×100) and those received by the respondent-2 Sri Basumatari would be 3,700 (37×100) , and as such the value of the votes received by Saikia was more than the quota. In this circumstances, the result of the election, in so far as it concerns the respondent-2 Sri Amrit Lal Basumatari, has been materially affected for the reasons that the value of the votes secured by him would be less than the quota and he was to be excluded. It may be stated that, in order to hold that the result of the election of the respondent-2 Sri Basumatari has been materially affected, acceptance of one first preference valid vote will be sufficient for the following reasons. In that case quota would be $[(123 \times 100) \div 3] + 1 = 4,101$. The respondent-3 David Ledger would have 399 surplus $(4,500 - 4,101 = 399)$. On reading of the rules 73, 80, 81 and 83, it appears that the surplus to be transferred would never exceed the number of the surplus of the candidate having surplus. Therefore, even all the surplus (399) are transferred to respondent-2 Sri Basumatari, the value of the votes he received would be 4,099 $(3,700 + 399)$ which is less than 4,100, the value of the vote received by the respondent-1 Sri Saikia.

13. Re-issue (vii).—For the reasons stated above, the petitioner is entitled to declaration that the election of the respondent-2 Sri Amrit Lal Basumatari to the Council of States from the State of Assam is void.

14. Re-issue (viii).—In this issue, the question which arises for consideration is whether the election petitioner is entitled to claim a declaration under section 101 that the respondent-1 has been duly elected. It has already been concluded that two first preference valid votes cast in favour of the respondent-1 Sri Hiteswar Saikia have been rejected improperly and, therefore, Sri Hiteswar Saikia received majority of votes. But this issue is to be decided later in view of the direction of the Supreme Court made in Civil Appeal No. 4530 of 1990 between the parties that election petition relating to the question under section 100 is to be disposed of first, and thereafter issue relating to section 101, i.e., the question relating to reprimination, is to be disposed of.

15. For the foregoing reasons, it is declared that the election of the respondent-2 Sri Basumatari to the Council of States from the State of Assam is void, and his election is set aside. This disposes of the question relating to section 100 of the Act and the issue question relating to section 101 of the Act shall be dealt in the reprimination petition.

IN THE GAUHATI HIGH COURT

(THE HIGH COURT OF ASSAM : NAGALAND :
MEGHALAYA : MANIPUR : TRIPURA : MIZORAM
AND ARUNACHAL PRADESH)

Recrimination Petition No. 18 of 1989

in Election Petition No. 23 of 1989

Shri Amrit Lal Basumatari

...Recrimination
petitioner

—Versus—

Shri Abdul Muhib Mazumdar and Ors.

...Election
petitioner

PRESENT :

HON'BLE MR. JUSTICE MANISANA

For the recrimination petitioner:—Mr. D. N. Chaudhury
Mr. A. K. Phukan, Mr. B. P. Kotoky, Mr. N. Dutta.
Mr. M. Bhuyan, Advocates.

For the election petitioner : Mr. B. N. Sen, Mr. P. K.
Sharma, Mr. S. S. Dey, Mr. K. P. Pathak, Mr. M.
Nath, Smt. N. Saikia, Mr. S. A. Laskar, Mr. A. B.
Chaudhury for respondent No. 1, Advocates.

Date of hearing : 7-8-90.

Date of judgment : 7 Nov 90.

JUDGMENT

Shri Amrit Lal Basumatary, the respondent-2 in Election Petition No. 23 of 1989, has set up a counter claim by presenting a reprimination petition, or giving a notice, under sub-section (1) of section 97 of the Representation of People Act, 1951 that if Shri Hiteswar Saikia, the respondent-2 herein, had been the returned candidate and a petition had been presented calling in question of his election, the election of Shri Hiteswar Saikia would have been void.

2. The opposite party has filed an application for striking out pleadings or rejecting the reprimination petition on the ground that the allegations are vague and, therefore, no cause of action has been made out.

3. Sub-section (2) of section 97 provides that every notice under sub-section (1) shall be accompanied by the statement and particulars required by section 83 in the case of an election petition and shall be signed and verified in the like manner. Section 83(1)(a) provides that an election petition shall contain a concise statement of the material facts on which the petitioner, relies. Therefore, the notice of reprimination petition shall contain material facts as provided under section 83(1)(a).

4. As regards the material facts, the settled position of law in that regard may be stated—

Material facts are facts which if established would give the petitioner the relief asked for. The test required to be answered is whether the Court can give a direct verdict in favour of the election petitioner on the basis of facts pleaded in the petition in case the returned candidate has not appeared to oppose the election petition (See *Manubhai Nandalal Amarsey Vs. Popatlal Manilal Joshi*, (1969) 3 SCR 217 : AIR 1969 SC 734).

The material facts are those facts necessary to formulate a complete cause of action. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad (see *Samant Vs. George Fernandez*, AIR 1969 SC 1201).

5. The grounds are stated in para 2 of the recrimination petition or counter-claim. The other paragraphs are submissions and are of formal nature. The grounds are stated in para 2 in the following terms :

“(a) That nine votes were cast on ballot papers marked otherwise than with the article supplied for the purpose and as such the said nine votes are required to be excluded from computation. Moreover, out of these nine, one ballot paper had multiple marking meaning 2 in Roman from numerals and no 1st preference was indicated therein, whereas another ballot paper out of the aforesaid nine contained preference 1, 2 and 3 and even therefore both these ballot papers were liable to be rejected by the Returning Officer, who accordingly excluded the said two votes from computation. However, in spite of specific objection by the Respondent No. 2 and his counting agent, Shri Punkaj Bora, the remaining 7 ballot papers were held to be valid by the Returning Officer. All the said 7 ballot papers contained 1st preference to Respondent No. 1. The Respondent No. 2 states that the said 9 votes including the two votes which have already been rejected by the Returning Officer are void and which are therefore required to be excluded from computation. The reception of such void votes and/or improper reception of the votes and/or non-compliance with the provisions of the Constitution or of the Representation of the people Act, 1951 or of the Rules and Orders made thereunder will have materially affected the result of the election in so far as it concerns Respondent No. 1, if the said Respondent No. 1 would have been declared as elected.

6. Mr. Sen, the learned counsel for the respondent—2 has contended that the allegations made in para 2 are vague, or that the allegations lack in material facts which would formulate a complete cause of action. Before dealing with the rival contentions it may be mentioned here that two ballot papers which have been rejected by the returning officer out of nine has been challenged in the Election Petition no. 23 of 1989. The matter has been dealt with in the election petition.

7. The main ground of attack of the election of Sri Saikia the respondent—2 herein is that the figure on the ballot papers was marked otherwise than with the article supplied for the purpose and, therefore, those ballot papers were to be rejected. Rule 73(2) (e) of the Conduct of Elections Rules, 1961 provides that a ballot paper shall be invalid on which there is any figure marked otherwise than with the article supplied for the purpose. The second proviso thereto reads : “Provided further that where the returning officer satisfied that any such defect as is mentioned in this clause has been caused by any mistake or failure on the part of a presiding officer or polling officer, the ballot paper shall not be rejected, merely on the ground of such defect”. Therefore, if there is any defect, namely figure marked otherwise than with the article supplied for the purpose, the ballot paper will not be rejected if the returning officer is satisfied that such defect has been caused by any mistake or failure on the part of a presiding officer or polling officer, merely on the ground of

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such a defect. It also may be noted that under illustration (c) section 114 of the Indian Evidence Act, it is to be presumed that official acts have been regularly performed.

8. Keeping the above position of law in view, let me now examine the case on hand. It has not been stated in the petition on as to what was the article supplied (whether an ink pen or a rubber stamp), how it could be said that there was improper reception of any of those votes, how and why the returning officer accepted the votes if they were marked otherwise than with the articles supplied for the purpose; and what were the serial number of the ballot papers, so as to make the opposite party understand the case he has to meet and to make a complete cause of action. The pleading is so vague that it left a wide scope to the recrimination petitioner to adduce evidence at his convenience in respect of the article supplied. In *Nihal Singh vs. Rao Birendra Singh*, (1970) 3 SCC 239, the Supreme Court has held :

“.....The pleading was so vague that it left a wide scope to the appellant to adduce evidence in respect of a meeting at any place on any date that he found convenient or for which he could procure witnesses. The pleading, in fact, was so vague and was wanting in essential particulars that no evidence should have been permitted by the High Court on this point...”.

(emphasis added)

Therefore, the above principle laid down by the Supreme Court is attracted and the recrimination petition is liable to be rejected. In the result, the counter claim, or the recrimination petition is rejected.

9. The next question which arises for consideration is whether the election petitioner is entitled to claim a declaration under which 101 of the Act that the respondent-1 Sri Hiteswar Saikia has been duly elected. It has already been concluded that Sri Hiteswar Saikia received majority of votes, that is, more first preference valid votes than the counter petitioner respondent-2 Sri Amrit Lal Basumatari. But my learned predecessor has, while dealing with the issue (iii), decided that, in view of the provisions under sections 82(a), 98(c) and 101 of the Act, in an election petition filed by an elector, he cannot claim declaration that any other candidate has been duly elected, viz “to seek declaration of this type at hand the petitioner must have been himself a candidate”. Decision in *Nag Raj Vs. R. K. Birla*, AIR 1969 Raj 245 was relied on.

10. Mr. Sen, the learned counsel for the election petitioner has contended that the decision is inconsistent with or oblivious of, the provisions under section 82(a) 98(c) and 101. Mr. Sen has submitted that section 81 itself makes it clear that, in an election petition filed by an elector, he can claim declaration under section 101 that any other candidate, other than the returned candidate, has been duly elected. The reason is simple, under section 81 an elector can file an election petition on any of the grounds specified under sections 100(1) and 101 calling in question the election of the returned candidate, and section 101 relates to the relief for declaration that any other candidate, other than the returned candidate, has been duly elected on any of the grounds stated thereunder. Mr. Sen has further submitted that the expression “he himself” appearing in section 82(a) and the word “petitioner” used in sections 98(c) and 101 of the Act are only relevant when the election petition is filed by a candidate for the following reasons. The associated words “any other candidate” employed under section 82(a) and 98(c) and “such other candidate” used under section 101 of the Act clearly indicate that, in an election petition filed by an elector, he can also claim declaration under section 101 that “any other candidate” has been duly elected.

11. The question which, therefore, arises for consideration is, in the same proceeding, I as a successor can ignore the finding on the issue or review the order, even, if I am inclined to come a contrary finding. I am, however, not expressing my opinion about the res judicata or review by the Court *quo motu* in such a situation as one thing is clear that a decision *per incuriam* can be ignored.

12. In respect of the decision per incuriam, in *Duke Vs. Reliance Systems Ltd.* (1987) 2 ALL ER 858, it has been observed :

"...the doctrine of per incuriam only applies where another division of this court has reached a decision in the absence of knowledge of a decision binding on it or a statute, and that in either case it has to be shown that, had the court had this material, it must have reached a contrary decision. That is per incuriam. I do not understand the doctrine to extend to a case where, if different arguments had been placed before it or if different material had been placed before it, it might have reached a different conclusion."

13. In *AR Antulay Vs R. S. Nayak*, (1988) 2 SCC 602, it has been held :

"Per incuriam" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong."

14. The decisions in the above cited cases show that the doctrine of per incuriam applies where a Court has reached a decision in the absence of knowledge of a decision binding upon it or a statute, and that in either case it has been shown that, had the Court had this material, it must have reached a contrary decision. However, the doctrine of per incuriam will not extend to a case where if different argument had been placed before it, it might have reached a different conclusion. This is not per incuriam. In *Antulay's* case it has also been held that if in a decision has been given per incuriam, the Court can ignore it and the doctrine of per incuriam is applicable in the same proceedings.

15. At this stage it would be helpful to refer to a decision of the Supreme Court in *K. Kamaraja Nadar Vs Kunju*, AIR 1958 SC 687. In that case, the Supreme Court has held:

"An election petition calling in question any election can be presented by any candidate at such election or any elector on one or more of the grounds specified in Ss. 100(i) and 101 to the Election Commission (now High Court) and a petitioner in addition to calling in question the election of the returned candidate or candidates may further claim a declaration that he himself or any other candidate has been duly elected. Where the petitioner claims such further declaration, he must join as respondents to his petition all the contesting candidates other than the petitioner and also any other candidate against whom allegations of any corrupt practices are made in the petition. The words "other than the petitioner" are meant to exclude the petitioner when he happens to be one of the contesting candidates who has been defeated at the polls and would not apply where the petition is filed for instance by an elector. An elector filing such a petition would have to join all the contesting candidates..." (The words within brackets supplied).

16. The decision of the Supreme Court above clearly indicates that any petitioner, either a candidate or an elector, in election petition can claim the relief under section 101 of the Act for declaration of election of the returned candidate to be void and also claim that any other candidate to have been duly elected. This decision is binding on us. But this decision was not brought to the notice of my learned predecessor. Had this decision been brought to the notice of my learned predecessor would have come to a different conclusion. In that view of the matter, the decision is per incuriam and it therefore, can be ignored. This being the position keeping the decision of the Supreme Court in *K. Kamaraja Nadar* (supra) in view and having regard to the submission Mr. Ser in an election petition an elector can claim declaration under section 101 of the Act any other candidate to have been elected.

17 It may be noted here that in *Nag Raj* (AIR 1969 Raj 245), which has been relied on by my learned predecessor, the Rajasthan High Court has, after extracting apart

of the above quoted passage of the decision of the Supreme Court in *Kamaraja's* case (AIR 1958 SC 587), observed:

"There is no doubt that these observations assume the competence of an elector to claim an additional declaration that.....any other candidate be declared duly elected."

18. For the reasons stated above, the election petitioner is entitled to the declaration that the respondent-2 herein, Sri Hiteswar Saikia to have been duly elected to the Council of States from the State of Assam. It may be stated that, in the election petition, the election of the counter-petitioner Sri Amrit Lal Basumatari to the Council States from the State of Assam has been set aside, and it has also been concluded that Sri Hiteswar Saikia received a majority of valid votes.

19. In the result, it is declared that Sri Hiteswar Saikia, the respondent—2 herein, has been duly elected to the Council of States (Rajya Sabha) from the State of Assam.

With the said observation and direction, the petition is disposed of with costs of Rs. 500 to be paid by Sri Amrit Lal Basumatari.

Sd/-

R. K. MANISANA, Judge.

[No. 82/AS-RS/23/89-90]

C. R. BRAHMAM, Under Secy.

नई दिल्ली, 27 नवम्बर, 1990

आ.अ. 88—लोक; प्रतिनिधित्व अधिनियम, 1951 (1951 का 43) की धारा 106 के अनुसरण में, निर्वाचन आयोग 1990 की निर्वाचन अर्जी सं. 24 में उच्च न्यायालय लखनऊ बेंच, लखनऊ के तारीख 27-8-1990 के निर्णय को एनद्वारा प्रकाशित करता है।

[सं. 82/उ.प्र.-लो.स./24/90(लख)]

आदेश से,

राम किशन, अवैर सचिव

New Delhi, the 27th November, 1990

O.N. 88.—In pursuance of Section 106 of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby publishes the judgement dated the 27th August, 1990 of the High Court of Judicature, Lucknow Bench, Lucknow, in Election Petition No. 24 of 1990.

LUCKNOW

Reserved Order

C.M. Appn. No. 74(E)-96

and

C.M. Appn. No. 100(E)-90

In re :

Election Petition No. 24 of 1990

Pati Rakhan alias P. L. Premi,

...Petitioner.

Vs.

Chand Ram & others

...O.Ps.

Hon'ble S. N. Sahay, J.—These are the applications by the petitioner for condoning delay in filing the election petition. The petitioner claims to be an elector in Hardoi Lok Sabha Constituency. A bye-election was held for Lok Sabha in the said constituency on 27th February, 1990. The result was declared on 28th February, 1990. Opposite party No. 1 Chand Ram was declared elected as member of the Lok Sabha in the said bye-election. The Election Petition has been filed by the petitioner for setting aside the election of opposite party No. 1 and for other reliefs.

The office report dated 24th April, 1990 shows that the time for filing the Election Petition was upto 14th April, 1990 and the Election Petition was filed beyond time by 10 days as on 24th April, 1990. The petitioner has moved 2 applications for condonation of delay. The first application is C.M. Appn. No. 74(E)-90. In this application the petitioner has alleged that the Election petition was ready on 11th April, 1990 but the petitioner could not move the petition in time due to lack of security money. The amount of security was deposited on 23rd April, 1990 and hence the delay of 11 days in filing the petition may be condoned.

The second application filed by the petitioner is C.M. Appn. No. 100(E)-90. It is alleged in this application that limitation for filing the Election Petition expired on 14th April, 1990. However, 13th, 14th and 15th April, 1990 were continuous Holidays. The Election Petition was submitted before the filing branch of the Court on 12th April, 1990 and the same was thrown away by the branch officials of the Registry. The Court officials did not allow the petitioner to move application (Annexure-A) before the Court for granting 25 days' time to deposit the security amount under Section 117(1) of the Representation of People Act. This resulted in the process to arrange the security for costs and arrange for the security money and the Election Petition was filed on 24th April, 1990 after depositing the security amount on 23rd April, 1990.

The petitioner has appeared in person and argued this case himself. The first mentioned application has been moved under Section 151 C.P.C. The second application has been moved under Order VI, Rule 17 read with Section 151 C.P.C. No application has been moved under Section 5 Limitation Act. However, assuming that the applications filed by the petitioner are maintainable, it will appear that the only ground on which the petitioner has applied for condonation of delay is that he could not arrange amount of the security money before 23rd April, 1990. It was the personal affair and duty of the petitioner to make arrangements for the deposit of the security amount well within time so that there might have been no delay in the filing of the Election Petition. In the absence of any reason given by the petitioner as to why he could not make any arrangement for security money, he is not entitled to any indulgence being shown to him. The mere statement that no arrangement could be made for deposit of security amount earlier, cannot be regarded as sufficient cause or exercise of inherent power for condonation of delay.

The petitioner has referred to the photostat copy of a receipt (Annexure-B) which is shown to have been given by the Additional Registrar of this Court. This receipt contains the words "File of B.P. Mr. P. L. Premi received". It does not bear any date. It does not establish the fact that the Election Petition was filed by the petitioner on 12th April, 1990. It does not stand to reason why the Court officials would throw away the Election Petition if it was filed on 12th April, 1990 and would not allow the petitioner to move the application (Annexure-A) before the Court. In that application there is a prayer for 25 days' time to make the security deposit. The petitioner admittedly had no means to deposit the security amount on 12th April, 1990. He has not explained the circumstances taking place between 12th and 23rd April, 1990. Therefore, even if the allegations made by the petitioner are for the sake of arguments taken to be correct, they did not help the petitioner in any way.

The petitioner has referred to certain authorities which may now be discussed. In *Dinabandhu Sahu vs. Jadumoni Mangarai and others*, 1954, Volume IX, Election Law Reports, 485 it was held by their Lordships of the Supreme Court that the proviso to Section 85 of the Representation of People Act, 1951 does not contemplate a formal application for condonation of delay, or the Election Commission giving to the respondent notice of the application or the holding of an enquiry as to the sufficiency of the grounds in his presence. It is open to the Election Commission to condone the delay suo motu if it is satisfied that there was sufficient cause for the delay. It may be mentioned that the proviso to Section 85 was that if a person making the petition satisfies the Election Commission that the sufficient cause exist for his failure to present the petition within the period prescribed therefor, the Election Commission may in its discretion condone such delay.

In *Chandrika Prasad Tripathi vs. Shiv Prasad Chanpuria and others*, 1959, Volume XXI, Election Law Reports, 172: their Lordships of the Supreme Court held that Section 117(3) of the abovementioned Act should not be strictly or technically construed that whenever it is shown that there has been a substantial compliance with its requirements, the Election Tribunal should not dismiss the Election Petition under Section 90(3) of the Act on technical grounds.

The case of *Kesab Chandra Patwari vs. Gouri Sankar Bhattacharya and others*, 1952, Volume II, Election Law Reports, 215 was decided by the Election Tribunal, West Bengal. It was held that the Election Tribunal can hear and decide the application whether the Election Petition referred to it is time barred and whether the petitioner was prevented by sufficient cause from presenting it within time. Even though the Election Commission had condoned the delay in presenting the petition.

The petitioner has next relied on the case of *S. Khader Sheriff vs. Election Tribunal, Vellore and others*, reported in Election Law Reports, Volume VII, page 471. This case was decided by the Madras High Court. It took the view that the Election Commission has jurisdiction to excuse delay in presentation of an Election Petition, either suo motu or on the application of the petitioner and that the Election Tribunal has power to hear the objections of the respondents and to vacate the order of the Election Commission and dismiss the petition if it is of opinion that there was no sufficient cause for excusing the delay. This case was decided under the old provisions of the proviso to Section 85 and Section 80(4) of the aforementioned Act.

All the abovementioned cases are distinguishable and are not applicable to the facts of the present case. Even if the words 'sufficient cause' are given a liberal construction as envisaged in the case of *Dinabandhu Sahu*, cited above, it will be found that the petitioner has not made out a case for condonation of delay. The petitioner's case has already been examined on facts and has been found that the petitioner has failed to establish that there was no negligence or inaction on his part or that he was prevented by any sufficient cause from making arrangement for the deposit of security money and filing the Election Petition within time.

In the result the applications of the petitioner referred to above, are rejected and the Election Petition is dismissed as time barred.

Sd/-
(S. N. SAHAY)

27-8-1990.
[No. 82-UP-HP/24/90(LKW)]
By Order,
RAM KISHAN, Under Secy.

नई दिल्ली, 27 नवम्बर, 1990

आ. अ. 89;—निर्वाचन आयोग 1990 की निर्वाचन अर्जी सं. 1 में केवल उच्च न्यायालय, एरनाकुलम के तारीख 13-7-1990 के निर्णय को लोक प्रतिनिधित्व अधिनियम, 1951 की धारा 106 के अन्वय में हमके द्वारा प्रकाशित करना है।

[य. 82/कैरल-लो. म./1/90]

आदेश में,

मी. एन. राज, सचिव

New Delhi, the 27th November, 1990

O.N. 89.—In pursuance of Section 106 of the Representation of the People Act, 1951 (43 of 1951) the Election Commission hereby publishes the judgement of the High Court of Kerala at Ernakulam dated 13-7-1990 in Election Petition No. 1 of 1990.

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

The Honourable Mr. Justice K. G. Balakrishnan.

Friday, the 13th July, 1990/22nd Ashadha, 1912
Election Petition No. 1 of 1990

Petitioner:—

I, Rama Rai, aged 58 years, son of A. Subhaya Rai, Post: Ichilumpadi, Via: Kumbala, Kasaragod Taluk and District.

By Advs. M/s. P. V. Madhavan Nambiar, :
Rosamma John and
C. S. Ramonathan.

Respondents:—

1. M. Ramanna Rai, Advocate, near Sreekrishna Talkies, Madhur Road, P.O. Kasaragod.
2. P. M. Aboobacker, P.O. M. House, Kallingal P.O., Pallikkere.
3. E. K. Abdul Rahiman, Padannakkad House P.O., Padannakkad, Hosdurg Taluk.
4. Aysha Mallath, Muliya Village, P.O. Munyar, Kasaragod District.
5. Narayana Palani Yadav, House No. 396, Palari Houses, P.O. Olayambadyvazhi, M. M. Bazar-670306.
6. K. T. Padmanabhan, New House, P.O. Vidyannagar, Kasaragod District.
7. C. K. Padmanabhan, B.J.P. Office, Karandakkad, P.O. Kasaragod.
8. A. Purushan, Avikkal House, Ajanur P.O., Kanhangad, Hosdurg Taluk.
9. Moideenkunhi, Nakreje Manzil, P.O. Perdala, Pin-670551.
10. T. M. Sebastian, Thekkil House, Kavyathadula P.O. Thayaneri, Via. Cherupuzha-670511.
11. Simon M. Jose, Medona, Pallikkere, P.O. Thevam, Pin-670301.

By Advs. M/s. M. K. Damodaran and M. P. Prabhakaran.

This Election Petition having been finally heard on 11-7-90, the Court on 13-7-1990 delivered the following:—

K. G. BALAKRISHNAN, J.

E. P. No. 1 of 1990

JUDGMENT

The petitioner had contested the general election to the House of the People (Lok Sabha) held on 22-11-1989 from No. 1 Kasaragod Parliamentary Constituency as a candidate of the Indian National Congress (Indira) Party, which was a constituent of the United Democratic Front. The United Democratic Front consisted of several other parties. The first respondent was a candidate supported by the Communist Party of India (Marxist) and this party was a constituent of the Left Democratic Front. The No. 1 Kasaragod Parliamentary Constituency consisted of 7 legislative assembly segments. They are Manjeswar, Kasaragod, Uduma, Hosdurg, Thrikkarippur, Payyannur and Taliparamba. Polling in all these L.A. segments took place on 22-11-1989. The counting of votes started on 26-11-89 and the result of the election was declared on 27-11-89. Out of 7,97,296 votes polled the petitioner secured 3,57,177 votes and the first respondent secured 3,58,723 votes. Thus, the first respondent was declared as duly elected by a margin of 1546 votes. The petitioner alleges that he had a fair chance of winning the election and he would contend that there were serious irregularities in conducting the election and that the first respondent resorted to various corrupt practices and this had materially affected the result of the election. Several allegations are enumerated in the petition and the first respondent raised a preliminary objection contending that the allegations contained in the election petition are vague and inaccurate and as the petitioner did not furnish sufficient and full particu-

lars regarding the alleged corrupt practices, the pleadings are liable to be struck out. The preliminary objection was heard and this court by order dated 18th June, 1990 held that the allegations in paragraphs 8 to 30 except 19, 21, 22 and 23 are liable to be struck out. So, at present we are concerned with the averments raised in paragraphs 19, 21, 22 and 23.

2. In paragraph 19 of the petition the petitioner contended that as per the final result sheet of the Hosdurg L.A. segment the petitioner secured 57,542 votes and the respondent secured only 50,037 votes. But by manipulation in form No. 20 Part II, the first respondent was shown to have secured 59,937 votes (which is in excess of 9900 votes) whereas the petitioner was shown as having secured 57,542 votes from the Hosdurg L.A. segment. Therefore, the petitioner alleges that correct entries have not been made in the final result sheet.

3. In paragraph 21 of the petition the petitioner contended that in polling station No. 7/86 of Payyannur L.A. segment the ballot papers to be found in the ballot box is shown as 980. However, in the final result sheet the figure shown is 920. It was also alleged that the presiding officers kept with them more than 50 signed ballot papers at a time.

4. In paragraph 22 of the petition it is alleged that in polling station No. 4 of Kasaragod L.A. segment the number of total ballot papers used was 975 and the ballot papers received by the polling station were also 975. But in the final result sheet it was shown that the total ballot papers received in the polling station are 1260. This is also a later manipulation.

5. In paragraph 23 the petitioner contended that in several polling booths the votes found in the ballot boxes were more than the actual votes polled. In polling booth No. 37 of Payyannur L.A. segment the total number of votes polled was 663. However, 673 votes were counted. In polling station Nos. 32, 57, 102, 110 and 43 of Payyannur segment and in booth Nos. 131, 118, 103, 43, 84, 34, 75, 23, 19 and 17 of Hosdurg segment there were excess or shortage in the number of votes, and in booth No. 9 of Hosdurg segment there was shortage of ballot papers and according to the petitioner this was due to the manipulation.

6. The first respondent contested the proceedings. Except the preliminary objection the first respondent has not filed any written statement. The learned counsel for the first respondent contended that after the striking out of paragraphs 8 to 30 except 19, 21, 22 and 23, the petition itself is not maintainable. The following issues were formulated for consideration:

"(1) Whether the election petition as now stands, i.e. after striking out paragraphs 8 to 30 excluding paragraphs 19, 21, 22 and 23, as such is maintainable?

(2) Whether the allegations contained in paragraph 19 of the election petition are true?

(3) Whether the averments made in paragraphs 21, 22 and 23 are true? If the allegations made in paragraphs 21, 22 and 23 are true, whether they have materially affected the result of the election?

(4) Whether a prayer for recounting is necessary to be incorporated in the election petition itself to grant such a relief? Whether recounting be ordered in the facts and circumstances of the case?

(5) Whether the election of the returned candidate is liable to be declared void?

(6) Whether the applicant is entitled to be declared elected?

(7) To what other relief, if any, the applicant is entitled?

(8) What is the order as to costs?"

On the petitioner's side PWs 1 to 8 were examined and Exts. P1 to P14 were marked. On the side of the respondents the first respondent was examined as RW1 and Exts R1 series were marked.

7. Issue No. 1.—The counsel for the respondents contended that the present election petition is not maintainable for the reason that the averments in the petition do not constitute any of the grounds mentioned in section 100 of the Representation of Peoples Act, 1951. In the election petition six reliefs have been prayed for by the petitioner. Under Relief No. 1 the petitioner seeks to declare the first respondent's election as void and under relief No. 2 the petitioner seeks to declare that he be declared as the duly elected candidate and in relief No. 3 to 6 the petitioner in fact included the various grounds for obtaining the first two reliefs. It has been stated under relief No. 3 that this Court should hold that the procedures adopted by the returning officers and the polling officers are illegal and violative of the orders issued by the Election Commission of India and the guidelines and provisions of law on the subject and therefore the result is vitiated. Under section 100(1)(d) any non-compliance with the provision of the Constitution or of the Act or Rules or Orders made under the Act is a ground for declaring the election void. However, if the returning officers or the polling officers violated any of the orders or guidelines issued by the Election Commission that is not a ground under section 100(1)(d)(iv) to declare an election to be void. Reliefs stated as 4 and 5 also related to some of the pleadings which were struck out by this Court. Even though the petitioner has mentioned these matters as reliefs in the petition, the allegations in paragraphs 19, 21, 22 and 23 are sufficient to give rise to a cause of action and therefore I hold that the petition as such is maintainable. Issue number 1 is found accordingly.

8. Issue No. 2.—In paragraph No. 19 of the petition it is alleged that the petitioner secured 57,342 votes from the Hosdurg L.A. segment of the Kasaragod Parliamentary Constituency and that the first respondent secured only 50,037 votes, and because of some manipulation the figure 50,037 was later shown as 59,937 in the final result sheet and on this ground the election of the first respondent is to be declared void. It is pertinent to note that the petitioner has not given the details as to the manner in which the so-called manipulations were done by the office. The petitioner simply asserted that the first respondent secured only 50,037 votes. The petitioner produced certain certified copies to substantiate these allegations. Ext. P4 is the certified copy of Form 20 Part II alleged to have been issued to the petitioner. Therein it is shown that the first respondent secured 50,037 votes from the Hosdurg L.A. segment of the Kasaragod Parliamentary Constituency. The other documents produced by the petitioner himself would show that this plea is incorrect and that the petitioner is trying to build up a case out of the typographical error that crept in Ext. P4 certified copy. Even in the document produced by the petitioner, i.e. Ext. P4(a) it is shown that the first respondent secured 59,937 votes from the Hosdurg L.A. segment. The explanation of the petitioner regarding this is that the back records were subsequently manipulated by the officers to suit the final figure of 59,937. Two witnesses were also examined to prove this fact. One of the counting agents of the petitioner was examined. He deposed that the total number of votes secured by the first respondent was announced by the Assistant Returning Officer and that he heard that the first respondent secured only 50,037 votes. A perusal of the relevant rules regarding polling and counting clearly show that this sort of mistake would not have happened and if so happened the counting agents of the petitioner could have very well noticed the discrepancy. Rule 44 of the Conduct of Elections Rules, 1961 deals with the manner in which sealing of ballot papers is to be done after the poll. The sealing of the ballot box is done in the presence of the polling agents of the respective candidates. The polling agent can affix his seal. The polling agent also will be allowed to inspect each of these boxes. Rule 45 says that the presiding officer shall at the close of the poll prepare a ballot paper account in form 16 and enclosed it in a separate cover with the words "Ballot Paper Account" superscribed thereon. Rule 45(2) says that the presiding officer shall furnish to every polling agent present at the close of the poll a true copy of the ballot paper account after obtaining a receipt from the said polling agent and he shall also attest it as a true copy. Rule 55 deals with

the scrutiny and opening of the ballot boxes for the purpose of counting. Before any ballot box is opened at a counting table, the counting agent present at that table shall be allowed to inspect the paper seal or such other seal as might have been affixed thereon and to satisfy themselves that it is intact. The returning officer shall satisfy himself that none of the ballot boxes has in fact been tampered with. Rule 56 deals with the manner in which counting is to be done and Rule 56(7) says that after the counting of all ballot papers contained in all the ballot boxes used at the polling station has been completed, the counting supervisor shall fill in and sign Part-II Result of Counting, in Form 16, which shall also be signed by the returning officer and the returning officer shall make the entries in a result sheet in form No. 20 and announce the particulars. From Rule 45 it is clear that the agent of the candidate will get the particulars of the total ballot papers received and the total ballot papers unused and also the number of ballot paper, if any, cancelled Form 16 Part I will also show that number of tendered ballot papers. Item 5 in form 16 part I will also show the total number of ballot paper to be found in the ballot box Form 16 Part II is to be filled up at the time of counting and Rule 56(7) states that the counting supervisor shall fill in part II of form 16 and the same shall be signed by the counting supervisor as well as the returning officer. From the entries in form 16 Part II the counting agent of the candidate would be in a position to know the number of votes secured by each candidate and also the total number of ballot papers rejected. If any discrepancy was noticed between the total number of votes polled and the total number of votes counted, that also will be entered in form 16 part II. It is the duty of the counting agent to get form 16 Part II signed by the counting supervisor as well as the returning officer. The contention of the petitioner is that his counting agent did not get form 16 part II duly signed by the counting supervisor and the Assistant Returning Officer. There is no case that the petitioner has ever filed any objection before the Assistant Returning Officer regarding the non-observance of Rule 56(7)(a) of the Conduct of Elections Rules, 1961. That fact is not specifically mentioned while narrating the ground in paragraph 19 of the petition. The Rules relating to polling and counting would clearly show that the agent of the petitioner would have been in a position to show that the first respondent secured only 50,037 votes from the Hosdurg L.A. segment. Form 16 Part II issued to the counting agent of the petitioner was not produced by the petitioner. Without producing this document the counting agents were examined in this case to prove the fact that first respondent got only 50,037 votes from the Hosdurg L.A. segment. There is absolutely no evidence to prove that the officers who were on election duty tampered with the entries in form 16 and the figure 50,037 was corrected as 59,937.

8A. The first respondent has produced a list of votes secured by him from each polling booth in Hosdurg segment. The entries given therein tally with the entries mentioned in the certified copies produced by the petitioner. The petitioner could not prove that any of these entries is wrong and that the first respondent secured only lesser number of votes than what has been shown therein. The petitioner has not mentioned as to the manner in which the alleged tampering of figure is done. It is not mentioned as to how did the petitioner come to know of the alleged tampering of figures. It is important to note that even though he filed a petition for recounting before the returning officer, this was not mentioned as a ground for recounting. The counsel for the first respondent pointed out that this mistake is found only in the certified copies produced by the petitioner and the certified copy issued to the first respondent does not contain any such mistake. The genuineness of the certified copy produced by the petitioner was challenged by the respondents. In spite of that fact, the petitioner has not summoned the original document and the petitioner has also not cared to summon the returning officer as a witness. After filing the election petition the petitioner had taken out summons to produce the entire records relating to the election. Thereafter the first respondent filed a preliminary objection and at that point of time it was suggested by the court that the petitioner can take further steps at a later stage for the production of the records. Thereafter the petitioner did not take any steps even when the genuineness of Ext. P4 series was challenged by the respondents. There is nothing in evi-

ence to show that the entries in form 16 in respect of the votes secured by the first respondent from Hosdurg segment were tampered with. There is also no evidence to show that the first respondent secured only 59,037 votes. So, there was no improper reception, refusal or rejection of any vote and there was non-compliance of any of the provisions of the Constitution or of the Act. Therefore, I hold that the allegations contained in paragraph 19 of the petition are not true and the election of the first respondent is not liable to be declared void.

9. Issue No. 3. In paragraphs 21, 22 and 23 of the election petition the petitioner has pointed out certain irregularities. In some cases at the time of counting there was missing of votes and the total number of votes counted was less than the number of votes polled. One instance has been mentioned in paragraph 23 of the petition. It is mentioned that in booth No. 39 of Payyannur segment 666 votes alone were polled. But at the time of counting it was found that there were 673 votes. Thus it is seen that 7 votes were found excess of the total number of votes polled. The petitioner has not averred in the petition that this was a result of the mal-practice done by the first respondent. It is also not specifically averred that this excess number of 7 votes has materially affected the result of the election. The first respondent while giving evidence explained that on his enquiry he came to know that the presiding officer put 7 tendered votes into the ballot box without keeping the same in a separate cover as envisaged under the Rules. Under Rule 42(4) the presiding officer, instead of putting the tendered ballot paper into the ballot box shall place it in a cover specially kept for the purpose and the number of tendered votes also should be separately shown in form 16 part I. This is one possibility of the excess number of votes being found in the ballot box. Any way the petitioner has no case that this was a corrupt practice done at the behest of the first respondent and it has materially affected the result of the election.

10. In paragraph 21 and 22 the petitioner has mentioned some instances where some votes were found missing. The list submitted by the petitioner would show that there were only very few instances. One reason that could be attributed to this discrepancy is that some voters might have taken the ballot papers out of the polling booth without the same being cast in the ballot box. There is no averment or evidence to the effect that this has materially affected the result of the election.

11. Eight witnesses were examined on the side of the petitioner. PWs 3, 4, 7 and 8 spoke about the various discrepancies found in respect of the number of votes counted and the number of votes polled. PW3 stated that in polling booth No. 43 of Payyannur L.A. segment, as per the ballot paper account 966 ballot papers were to be found in the ballot box but at the time of counting 969 votes were found in the ballot box. Ext. P7(f) is Part-I of Form 16 produced by the petitioner, in respect of polling booth No. 43 of Payyannur L.A. segment. Ext. P7(f) shows that the ballot papers to be found in the ballot box are 966. It is not known as to how many votes were counted in respect of polling booth No. 43. PW3 would contend that he was not served with Part-II of Form 16.

12. PW7 was a counting agent of the petitioner in the counting station of Payyannur L.A. segment and he deposed that there were excess of 3 votes from polling Booth No. 43 of Payyannur L.A. segment. Except the oral testimony of PW 3 and 7 no corresponding document is produced in this regard. It is not known as to what was the total number of votes counted. The petitioner should have summoned the original records to show that there were excess of votes. The petitioner has also not cared to produce original Form 16 Part-II to show at least that there were excess number. Therefore, the evidence of PWs. 3 and 7 alone is not sufficient to hold that there was discrepancy between the number of votes polled and the number of votes counted.

13. PW4 is stated to be a counting agent of the petitioner. He deposed that at the time of counting of votes from Payyannur L.A. segment he was present and 793 votes were counted from booth No. 32 of Payyannur L.A. segment. According to this witness there should have been 798 votes and 5 votes were missing. The relevant Form 16 Parts I and II are not produced by the petitioner. The petitioner has also not cared to produce the original documents before the

Returning Officer to prove that from polling booth No. 32 of Payyannur L.A. segment, 793 votes were counted whereas it should have been 798 votes. As the relevant documents are not produced, it is not possible to rely on the oral testimony of PW4 to hold that there was discrepancy.

14. PW8 was a counting agent in the Payyannur L.A. segment. In the chief examination he claimed that he was the counting agent of the petitioner but in the re-examination he admitted that he was the counting agent of the 5th respondent. PW8 deposed that at the time of counting he had raised an objection that in respect of booth Nos. 102 and 110 of Payyannur L.A. segment the total number of votes polled was not tallying with the total number of votes found in the ballot box and that he demanded a recounting. PW8 has no case that he filed written petition for recounting. The counting officer told PW8 that he should file a petition before the Returning Officer. But, he did not file any such petition. The evidence of PW8 cannot be accepted to hold that there were irregularities in the counting.

15. The petitioner has produced various documents ranging from Exts. P1 to P14. Many of these documents are not satisfactorily proved by examining competent witnesses. The petitioner has produced only Part-I of Form 16. The various counting agents who received Part-I of Form 16 were not examined. The petitioner has not summoned the original to prove that there were discrepancies between the number of votes polled and the number of votes counted. The documents produced by the petitioner are inadequate and no reliance can be placed on these documents. The certified copies produced by the petitioner admittedly contain wrong entries and the correctness of these entries was challenged by the 1st respondent. It was the duty of the petitioner to summon the originals to prove his case. Therefore, I hold that the averments in paragraphs 21, 22 and 23 are not proved and the petitioner failed to establish that the result of the election was materially affected.

16. Issue No. 4 The learned counsel for the 1st respondent pointed out that the petitioner has not specifically prayed for recounting of votes and, therefore, such a prayer cannot be entertained. The petitioner's counsel submitted that it is not necessary that the prayer for recounting should be stated in the petition as it is only an ancillary relief. Section 98 of the Representation of the People Act, 1951 says that :

"At the conclusion of the trial of an election petition the High Court shall make an order,—

- (a) dismissing the election petition; or
- (b) declaring the election of all or any of the returned candidates to be void; or
- (c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected".

The prayer for recounting is only an ancillary relief and this need not be specifically mentioned in the election petition. However the Section by adverting satisfactory evidence must establish to prove that there are grounds for ordering recounting.

17. The Supreme Court in various decisions has succinctly held that the recounting could be allowed only under exceptional circumstances. In *Bhabhi v. Shoo Govind* (1975 S.C.R. 202) the Supreme Court held that the following conditions are imperative before a Court can grant inspection or sample inspection of the ballot papers :

- "(1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;
- (2) That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts;
- (3) The Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount;

- (4) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void and
- (5) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount and not for the purpose of fishing out materials”.

The Supreme Court held in *N. Gopal Reddy v. B. Krishnamurthy* (A.I.R. 1987 Supreme Court 831) held that :

“When a general recount and scrutiny of all the ballot papers is directed by the High Court, it would be unjust and unreasonable and contrary to the will of the electors, to deny benefits of valid votes cast in favour of the returned candidate or to ignore invalid votes counted by the Returning Officer as having valid votes in favour of the unsuccessful candidate and to set aside the election of the returned candidate. The purpose and object of the election law is to ensure that only that person should represent the constituency who is chosen by the majority of the electors. This is the essence of Democratic process”.

The same view was held in *K. K. Shamsudeen v. K.A.M.M. Behindeen* (A.I.R. 1989 Supreme Court 640), *N. Harayanan v. S. Semnalai* (A.I.R. 1980 Supreme Court 206), *D.P. Sharma v. Commr. & Setzning Officer* (123 R. 1984 Supreme Court 654), *Hari Ram v. Hira Singh* (A.I.R. 1984 Supreme Court 396), *Jaggi Singh v. Kartar Singh* (A.I.R. 1986 Supreme Court 773), *Ram Sewak v. H.K. Kidwai* (A.I.R. 1984 Supreme Court 1249), *Beliram Bhalai v. Jai Beharilal Khachi* (1975 4 Supreme Court Cases 417) and *Baldev Singh v Teja Singh* (1975) S.C.R. 381). From the above decisions it is well established that in order to obtain a recount there must be proper allegations in the election petition indicating the precise material on the basis of which it could be urged. Where no such material is placed before the court and the discrepancies pointed out by the petitioner are insignificant and it may not materially affect the result of the election, no recount can be ordered by the court. An order of inspection may not be granted as a matter of course having regard to the insistence of secrecy of the ballot papers and the Court would be justified in granting an order of inspection only if there are adequate statement of the material facts on which the petitioner filed in respect of his prayer for setting aside the election. An order for inspection of ballot papers cannot be granted to support vague pleas unsupported by material facts and the petitioner may not be given an opportunity to have a “fishing expedition”. A mere allegation that the petitioner suspects or believes that there has been an importer reception or rejection of votes will not be sufficient to support an order for inspection.

18. In the instant case the petitioner seeks for recounting of ballot papers of Hosdurg and Payyannur L.A. segments. As regards Hosdurg L.A. segment the contention of the petitioner is that the 1st respondent secured only 50,037

votes, and not 59,937 votes shown in the final result sheet and the same could be proved by recounting. I have already found that there is nothing in evidence to show that the 1st respondent secured only 50,037 votes from the Hosdurg L.A. segment. The documents produced by the petitioner are not sufficient to substantiate that pleading. It is also important to note that the petitioner had no such case at the time when he filed the application for recounting. Ext. PS is the office copy of the petition submitted by the petitioner for recounting of votes. In Ext. PS the petitioner has alleged that there were some malpractice in the matter of counting at Thaliparamba L.A. segment. In Ext. P8 he has not mentioned the nature of the malpractice that had allegedly taken place in Thaliparamba L.A. segment. He only mentioned that the officials who participated for counting work had shown some prejudice to the counting agents of the petitioner and that the objections raised by the petitioner's counting agents were not headed by the officials. The nature of the objections raised by the petitioner's counting agents is not mentioned in Ext. P8. It is important to notice that when the petitioner gave Ext. P8 application for recounting on 27-11-1989, no objection was raised regarding the counting of votes at Hosdurg L.A. segment and at Payyannur L.A. segment. It is quite possible that the petitioner might have been aware of the number of votes secured by himself and the 1st respondent from Hosdurg L.A. segment and entries in the final result sheet would have been known to the petitioner. Even then no objection was raised regarding that at the time when Ext. P8 petition was filed.

Ext. P12 is another application submitted by the petitioner on 27-11-89 wherein he made a request for recounting of votes of Manjeswar, Hosdurg and Udma L.A. segments. In Ext. P12 the petitioner alleged that some fraud and malpractices were committed by the officials on duty at the counting centre and his counting agents repeatedly gave objections regarding the fraud and malpractices and the officials turned a deaf ear to such complaints and behaved partially. The nature of fraud and malpractices are not mentioned in Ext. P12. The petitioner has also not produced any documents to show that his counting agents had raised any objection at the time of counting. Ext. P13 is another petition wherein the alleged that the Returning Officer had not passed any orders in his petition for recounting till 29-11-89. There is nothing in evidence to show that the Returning Officer failed to pass an order in the petition submitted by the petitioner. Ext. P14 is the order passed by the Returning Officer. The order is dated 27-11-89. There is nothing in evidence to show that Ext. P14 order was passed by the Returning Officer subsequently.

19. I have dealt with in detail regarding the discrepancies pointed by the petitioner between the number of votes polled and the number of votes counted. The discrepancies found, if any, are not of serious consequences. It is not possible to assume that there was any fraud or malpractice in the process of conduct of the election. There is also nothing in evidence to show that there was importer rejection of any valid votes or importer acceptance of any invalid votes. PW2 one Mamma was examined to prove that he had submitted a petition to the presiding Officer alleging that there was some malpractices by voters. Ext. P9 is the letter wherein he stated that he had submitted a complaint to the Returning Officer. The original petition is not produced before Court and the Returning Officer

also was not examined by the petitioner to speak about the petition submitted by P12. The gist of the allegation is that in booth No. 38 of Payyannur L.A. segment there was impersonation by some voters and some muslim voters were threatened by others and they were not allowed to cast their votes. The names of the persons who were threatened are not mentioned in the complaint or in the election petition. It is also not mentioned as to who committed impersonation. The evidence of PW2 and Ext. P9 series do not substantiate the petitioner's case. The allegations in the petition and the allegations contained in the various complaints submitted by the petitioner are not sufficient to hold that the petitioner is entitled to have a recounting.

Issues 5 to 8 :—

As the petitioner has not proved any of the grounds for which the election of the 1st respondent could be declared void, the election petition is dismissed under Section 98(a) of the Representation of the People Act, 1951. The petitioner is liable to any costs to the 1st respondent which I fix at Rs. 2,000/-.

The substance of the decision shall be communicated to the Election Commission and the Speaker of the Lok Sabha. An authenticated copy of the judgement shall be sent to Election Commission at an early date.

13th July, 1990.

Sd/- K. G. BALAKRISHNAN, Judge

[No. 82/KL-HP/1/90]

By Order,

C. L. ROSE, Secy.